Supreme Court, U.S.
FILED
00 376 SEP - 8 2000
OFFICE OF THE CLERK

No. 00-

IN THE
Supreme Court of the United States

DR. WILLIAM G. PATTERSON, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHUCK R. PARDUE
PARDUE & ASSOCIATES, PC
Attorneys for Petitioner
563 Greene Street
Augusta, Georgia 30901
(706) 823-2000

162093

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

57pp

QUESTIONS PRESENTED

WHETHER THE UNITED STATES ARMY AND THE REVIEWING COURTS BELOW, ERRED BY DENYING THE PETITIONER HIS FIFTH AMENDMENT DUE PROCESS RIGHTS BY DENYING PETITIONER A STATUTORY AND REGULATORY MANDATED HEARING.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitution and Statutory Provisions Involved	1
Statement of the Case	3
Proceedings Below	4
Reasons for Granting the Writ	5
I. Petitioner Was Denied His Fifth Amendment Due Process Right To A Hearing, His Statutory Right To A Full And Fair Hearing Under 10 U.S.C. § 1214; And Administrative Due Process As Provided For Under Army Regulation 635-40.	5
II. Statutory And Regulatory Framework Of The Military Disability System.	5
III. Dr. Patterson Was Improperly Denied His Administrative Due Process Rights.	16
Conclusion	27

TABLE OF CITED AUTHORITIES

Page

Cases:

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 71 S. Ct 624, 95 L. Ed. 817 (1951) 8, 9

Bell v. United States, 366 U.S. 393, 81 S. Ct. 1230 6 L. Ed. 2d 365 (1961) 24

Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 10 S. Ct. 462, 33 L. Ed. 970 (1890) 15

Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) 11, 12, 13, 26

Ferrell v. United States, 23 Cl.Ct. 562 (1991) 25

Larionoff v. United States, 431 U.S. 863, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977) 24

Morgan v. United States, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936) 15

Norman v. United States, 392 F.2d 255 (Ct. Cl. 1968) 23

Sawyer v. United States, 930 F.2d 1577 (Fed. Cir. 1991) 24, 25

Wyatt v. United States, 2 F.3d 398 (Fed. Cir. 1993) .. 23

Cited Authorities

Page

Statutes:

10 U.S.C. § 1201-1221 13

10 U.S.C. § 1201 .....3, 5, 12, 19

10 U.S.C. § 1204 ..... 2, 3, 7, 8, 12

10 U.S.C. § 1205 12

10 U.S.C. § 1206 12

10 U.S.C. § 1214 ..... *passim*

10 U.S.C. § 1215 ..... 3, 8, 12, 17, 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 11

28 U.S.C. § 1346 11

28 U.S.C. § 1402 11

28 U.S.C. § 1504 11

28 U.S.C. § 2110 11

28 U.S.C. § 2401 11

Cited Authorities

	Page
28 U.S.C. § 2402	11
28 U.S.C. § 2411	11
28 U.S.C. § 2412	11
28 U.S.C. §§ 2671-2680	11
37 U.S.C. § 307(a)	23
United States Constitution:	
Fifth Amendment	i, 1, 19
Other Authorities:	
Department of Defense 1332.18	14
Army Regulations:	
635-40 Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation, 13 Dec. 1985	*passim*
40-501 Standards of Medical Fitness, 14 June 1989	17
15-185 Army Board of Correction of Military Records, 18 May 77	21
"Military Disability in a Nutshell", 109 Military Law Review, 149 (1985)	3

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Federal Circuit Denying Petitioners Claim Dated And Filed June 12, 2000 ..... 1a

Appendix B — Opinion Of The United States Court Of Claims Dated And Filed August 11, 1999 ... 3a

Appendix C — The Army Board Of Correction Of Military Records Decision Dated September 29, 1997 ..... 14a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit Decision of affirmance without opinion is attached as Appendix A. The Court of Claims opinion, *Patterson v. United States* is attached as Appendix B. The Army Board of Correction of Military Records application and decision is attached as Appendix C. None of these decisions are published.

STATEMENT OF JURISDICTION

The judgment for the United States Court of Appeals for the Federal Circuit was entered on June 12, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment Due Process Clause of the United States Constitution.

The Due Process Clause of Amendment V of the United States Constitution provides:

> no person shall . . . be deprived of life, liberty, or property without due process of law.

10 U.S.C. § 1204 provides:

> Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unable to perform the duties of his office, grade, rank, or rating because of physical disability resulting from an injury, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that —
>
> 1. based upon accepted medical principles, the disability is of a permanent nature;
>
> 2. the disability is the proximate result of performing active duty or inactive-duty training;
>
> 3. the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
>
> 4. either —
>
> a. the member has at least 20 years of service computed under section 1208 of this title; or
>
> b. the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination.

10 U.S.C. § 1214 provides:

> *No member* of the armed forces *may be* retired or *separated* for *physical disability without a full and fair hearing* if he demands it.

(Emphasis Added)

10 U.S.C. § 1215 provides:

> The laws and regulations that entitle any retired member of a regular component of the armed forces to pay, rights, benefits, or privileges extend the same pay, rights, benefits, or privileges to any other member of the armed forces who is not a member of a regular component and who is retired, or to whom retired pay is granted, because of physical disability.

STATEMENT OF THE CASE

United States Army, as well as other branches of service, has a military disability system to separate or retire ill or injured service members. The system is statutory based and implementing regulations offer a full panoply of administrative due process rights that apply to both active duty and reservists.[1] Dr. William G. Patterson was denied access to those due process rights and denied military disability benefits.

The Petitioner, a dentist, was serving in the United States Army Reserve for a two-week period beginning April 1, 1989

---

1. *See* 10 U.S.C. § 1201 *et seq.* Specifically 10 U.S.C. §§ 1204, 1214, 1215; DOD Directive 1322.18; Army Regulations 635-40; 40-501 Chapter 3; Army Regulations 40-3; *See generally* "Military Disability In A Nutshell", 109 Military Law Review, 149 (1985).

and ending April 14, 1989. During that period, he developed chest pains, was evaluated, and referred to Fitz Simmons Army Hospital in Denver, Colorado for cardiac catheterization. During the cardiac catheterization, he coded (his heart stopped), suffered a major heart attack, and brain damage. As part of the efforts to resuscitate him, he underwent emergency heart surgery, in which the heart surgeon referring to the attempted catheterization opined "there was a chance that there was a dissection in the left main coronary".

Dr. Patterson was not expected to survive and four army doctors signed off on a medical board referring him to a Physical Evaluation Board (PEB) and indicated his disability was incurred during his military service. Unfortunately for Dr. Patterson, the medical board was lost and never processed at the PEB, which is the next step in the administrative procedure for military disability cases.

Dr. Patterson had a partial recovery. Even though he was mentally and physically impaired, he was carried on the rolls of his reserve unit for several more years until he was finally forced out of the reserves for failing to complete physical readiness tests. He was denied all military disability benefits. Petitioner appeals to this honorable court because he is seeking to have the government uphold his statutory and regulatory right to a PEB hearing to which he was denied by the United States Army.

PROCEEDINGS BELOW

Petitioner applied to the Army Board of Correction Military Records (ABCMR). The Army Surgeon General opined that the disability claim was well founded, however the Army Disability Review Agency opined the Dr. Patterson had a heart

attack for reasons unrelated to his military service and the ABCMR denied benefits. The basis of the claim to the ABCMR was that he should have been medically retired for disability and that he had not been given a hearing. The ABCMR also denied a hearing and rejected the disability claim (*See* Appendix C). The United States Court of Claims in a written opinion at Appendix B also denied Dr. Patterson claim.[2] The United States Court of Appeals for the Federal Circuit affirmed the Court of Claims decision without opinion on June 12, 2000. Petitioner files this Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED HIS FIFTH AMENDMENT DUE PROCESS RIGHT TO A HEARING, HIS STATUTORY RIGHT TO A FULL AND FAIR HEARING UNDER 10 U.S.C. § 1214; AND ADMINISTRATIVE DUE PROCESS AS PROVIDED FOR UNDER ARMY REGULATION 635-40.

II. STATUTORY AND REGULATORY FRAMEWORK OF THE MILITARY DISABILITY SYSTEM.

Disability laws have been enacted to establish a means of fairly compensating active duty service members who can no longer perform their duties because of a physical disability.[3] Disability processing normally commences with the service member's treating physician referring the member's case to a

---

2. The Court of Claims was under the mistaken impression that Petitioner did not request a hearing at the ABCMR, but the record shows he did. Compare footnote 1 of the court of claims decision with the record, (Joint Appendix (Hereinafter – JA) page 130, item 6).

3. *See* 10 U.S.C. § 1201, *et seq.*

Medical Evaluation Board (MEB).[4] The MEB screens cases for possible referral to the PEB. A case will be referred to a PEB on concurrence of two physicians. PEB considers a soldier's case, both informally and formally. Informal PEB's only review records and do not personally examine the service member.[5] The formal PEB is normally convened upon the demand of the soldier being processed.[6] The PEB not only makes findings and recommendations of "fit" or "unfit" to the Secretary of the Army, but also recommends a percentage of disability, whether a soldier is to be discharged with no benefits, separated with severance pay, placed on the Temporary Disability Retired List, or permanently retired from the military. Because about ninety-five (95%) percent of the decisions of the PEBs are approved by various appellate and review boards and the Secretary of the Army, the consideration, both informally and formally at the PEB represent the critical stage of military disability processing.

The rights of soldiers at the formal PEB hearing include the right to legal counsel for advice and representation, and the right to introduce witnesses, depositions, documents, or other evidence in his or her own behalf. The service member also has the right to testify, thereby providing the board members an opportunity to observe the soldier's physical problems first hand. In this aspect, the formal PEB has an advantage over the other reviewing authorities in the process, as the formal PEB is able to consider the soldier's credibility and demeanor. The PEB's findings are announced in an open session and also given in writing to the soldier. For a member who disputes the military's

4. *See* Army Regulation 635-40, paragraph 4-6. (JA A-225).

5. *See* Army Regulation 635-40, paragraph 3-10. (JA A-224).

6. *See* Army Regulation 635-40, paragraph 4-20. (JA A-228).

view of his or her disability, the formal PEB is the most important stage of military disability processing. Approximately one-half of soldiers who present themselves to a formal PEB increase their disability benefits or achieve what they consider successful results.

After the PEB completes processing, the case file is forwarded to the United States Army Physical Disability Agency (USAPDA).[7] The USAPDA, through the Disability Review Council (DRC), reviews the case to ensure that disability laws, policies, and directives are consistently and equitably applied.[8] If a member disputes the finding of the USAPDA, the member may appeal to the Army Physical Disability Appeal Board (APDAB).[9]

By not allowing his case to go before the PEB, the Petitioner was denied his Fifth Amendment Due Process Right to a hearing, as well as his statutory right to a full and fair hearing under 10 U.S.C. § 1214. This denial of Petitioner's right to a full and fair hearing has caused him irreparable harm by denying him the opportunity to present evidence to justify a lifetime disability pension, military medical benefits, and other "I-D Card" military benefits for himself and his family. Petitioner submits that, given his injuries in the military, 10 U.S.C. § 1204 gave Petitioner an expectation, if not an outright grant of a property right, in a military disability retirement. The law allows reservists on active duty for 30 days or less, with service incurred or aggravated injuries or illness

---

7. *See* Army Regulation 635-40, paragraph 3-3. (JA A-224).

8. *Id.*

9. *See* Army Regulation 635-40, paragraph 3-8 and 4-22e. (JA A-224 & 231).

to receive military medical retirement. (10 U.S.C. § 1204 and 10 U.S.C. § 1215) Even though all four of his military doctors thought Petitioner was near death and severely and profoundly disabled, the military establishment denied Petitioner a hearing required by law and its own regulations. (above cited statutes, Army Regulation (AR) 635-40).

The Due Process clause of Amendment V of the United States Constitution provides "No person shall . . . be deprived of life, liberty, or property, without due process of law". At the outset, Petitioner asserts that he has been deprived of a property interest without due process of law.

Petitioner contends that his right to military disability pay is an important property right, which cannot be taken from him without due process of law. Petitioner is entitled to military disability pay if he shows that his service was interrupted and he could no longer continue to reasonably perform because of a physical disability incurred or aggravated in service. Since he suffered from a heart attack and a stroke and was near death, (which Petitioner contends was due to the catheterization operation in which military doctors accidentally dissecting his left main coronary artery) there is no dispute that his disability was severe, and that the disability prevented him from performing his duties as a military dentist.

In *Anti-Fascist Committee v. McGrath*, Justice Frankfurter wrote:

> [f]airness of procedure is "due process in the primary sense." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 . . . "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the

> fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard . . ." *The Japanese Immigrant Case*, 189 U.S. 86, 100-101. "[B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar v. Reclamation District*, 111 U.S. 701, 708. "Before its property can be taken under the edict of an administrative officer, the appellant is entitled to a fair hearing upon the fundamental facts." *Southern R. Co. v. Virginia*, 290 U.S. 190, 199.

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 161-162, 71 S. Ct. 624, 95 L. Ed. 817 (1951). Petitioner submits that each of these principles apply with equal force to the deprivation of his property right to a military disability pension.

The government has argued in briefs to the Claims Court that the reason for Dr. Patterson's forced retirement was for his failure to pass the Army's physical fitness test years after his injuries. However, in the Administrative Record, (JA 134 to 135) to the Surgeon General's report found:

> d. The applicant did not meet the retention standards in AR 40-501, Chapter 3, paragraph 24c,

> dated 15 May, 1989 which were in effect at the time of his injuries. Neither did he meet the retention standards in AR 40-501, Chapter 3, paragraph 21a, dated 9 February 1987 which were in effect at the time of his cardiac arrest and coronary artery bypass.

Furthermore, Petitioner submits the reason he could not pass the physical fitness test was the results of his heart condition and brain damage caused by army physicians. However, he was not allowed a hearing (PEB) to present this evidence before an impartial board. All the military doctors who reviewed Petitioner's case at the time of the injury, and the Army Surgeon General's review years later, unanimously agree that he was disabled in 1989, that it was incident to service, and that he should have been presented to a PEB or that his application for military disability be approved.

The government has contended that Petitioner has shown no proof that he has been harmed by the denial of a PEB hearing. It states that the results of a PEB hearing would not differ from the outcome decided by the ABCMR. They concluded below that, without proof to the contrary, Dr. Patterson should continue to be denied a full and fair hearing before the PEB.

However, this argument is circular. By denying him a full and fair hearing, Respondent has eliminated Dr. Patterson's access to the very evidence he needs to prove that the catheterization resulted in a dissection to his left coronary, which resulted in his heart attack and later his 100% disability status. Absent a PEB hearing, Dr. Patterson has limited access to the government employees and documents he would rely on to develop his theory of the events which took place during the catheterization. A fact issue that should be developed at the formal PEB is whether the heart attack and stroke were caused

by the procedure. The government contends it was not, but denied Dr. Patterson a hearing that would have given him the opportunity to rebut the government's unsubstantiated medical conclusions. Additionally, Petitioner wanted to present evidence that he was ordered over his objection to submit to the unfortunate catheterization. The Court of Claims refused to consider affidavits on that issue, although it was an issue that could have been considered by the PEB, which applies a different evidentiary standard.

Petitioner submits that his denial of a PEB hearing has resulted in him being left with no remedy for his service-aggravated injury. The normal remedy for an injury sustained at the hands of a government employee is to pursue a medical negligence claim under the Federal Tort Claims Act (28 U.S.C §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671 through 2680.) However, this Honorable Court has held in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) that service members are precluded from filing suit for medical negligence on the part of military physicians.

In *Feres*, the Supreme Court considered the applicability of the Federal Tort Claims Act to three cases with similar fact patterns. All of the cases involved servicemen who, while on active duty, were injured or died due to negligence of others in the armed forces. Two of the three cases alleged medical negligence on the part of military physicians. In analyzing the Federal Tort Claims Act, the Court stated that

> "[t] he primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the

> behalf of military and naval personnel, because a **comprehensive system of relief had been authorized for them and their dependents by statute**." (Emphasis Added) *Id.* at 140, referring to the military disability system 10 U.S. Code 1201 et. al. and the Veterans Administration process under Title 38 of the U.S. Code. The Court further observed "[t] he compensation system . . . is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely favorably with those provided by most workmen's compensation statutes." *Id.* at 145.

The Supreme Court in *Feres* recognized that Congress' intent in establishing military disability law under 10 U.S.C. § 1201 *et seq.* and the Veterans Administration disability provisions under Title 38 of the U.S. Code was to eliminate litigation against the military and provide a comprehensive no fault system of compensation to those soldiers injured with or without the negligence of others in the armed forces. The Court anticipated that Dr. Patterson would find a fair remedy in the system established by Congress for compensating service members for this type of injury. Therefore, Dr. Patterson must look to the applicable statutes enacted by Congress (10 U.S.C. §§ 1204-1206; 10 U.S.C. § 1214; and 10 U.S.C. § 1215), and the regulations promulgated by the Army for enforcement of those statutes, as his only remedy for the injury he sustained at the hands of the military physicians involved in his catheterization. However, as part of their rationale, the ABCMR implied that medical negligence must be shown for Dr. Patterson to recover. However, to require proof of medical negligence would fly in the face of the Supreme Court's rationale in *Feres*. Without a hearing, when his doctors have referred the case for a hearing as required by Army Regulations, how does a service

member have "his day in court?" The Supreme Court stated concerning cases like this:

> A soldier is at a distinct disadvantage in litigation. Lack of time and money, the difficulty, if not impossibility, of procuring witnesses, are only a few of the factors working to his disadvantage.

(*Feres*, 340 U.S. 135, 145).

The no fault military disability system was designed to minimize adversarial litigation. It is supposed to be non adversarial, with a "full and fair hearing" (10 U.S.C. § 1214). Dr. Patterson received neither a full nor a fair hearing. Despite being near death and totally helpless, he received no hearing at all. His treating physicians followed procedure, but the reviewing authorities dropped the ball. All the evidence at the time of the injuries supports the inescapable conclusion — his case should have been considered by a PEB. Why does the Army resist this case being exposed to three impartial Army officers to review dispassionately the evidence when they have three permanent sitting boards to review cases such as this one? The PEB could have made findings of fact and recommendations, applying a preponderance of the evidence standard on the key issue in this case — whether Dr. Patterson's heart attack was either caused or aggravated by the unfortunate catheterization procedure.

Congress intended that "[n]o members of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." 10 U.S.C. § 1214. These laws are codified at 10 U.S.C. §§ 1201 through 1221. The Department of Defense carried out the statutory intent of Congress to provide a remedy to service people in Petitioner's

situation through DOD Directive 1332.18. In turn, the various services promulgated regulations implementing the DOD directive and the Federal Statutes. The Army regulation covering this issue is Army Regulation 635-40, effective 13 December 1985.

In fact, the MEB reviewing Dr. Patterson's records did recommend his case be forwarded to a PEB. That the Army chose to ignore that recommendation is further proof that Petitioner has been denied his Fifth Amendment right to procedural due process and administrative due process in this case.

Army Regulation 635-40 at 4-17a provides that the purpose of a PEB is "to evaluate all cases of physical disability equitably for the soldier and the Army", and further that a PEB is "a fact-finding board for . . . (3) Providing a full and fair hearing for the soldier as required by section 1214, title 10 US Code (10 US Code 1214)". The only required action on the part of the soldier to receive a full and fair hearing is that-he demand it.

Petitioner, through his wife, did demand a PEB consider his case. His wife signed, because the Army physicians, at the time, considered Petitioner terminally injured and too disabled because of the brain damage and other medical problems to sign his own request for a hearing. For unknown reasons, the Army did not forward the medical board to the PEB.

The Supreme Court, in dealing with the issue of the right to a hearing when a statute requires one, has stated that:

> "[a] proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has

> a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument." *Morgan v. United States*, 298 U.S. 468, 480, 56 S.Ct. 906, 80 L.Ed. 1288 (1936). And "that administrative orders, quasi-judicial in character, are void if a hearing was denied . . ." *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 457, 10 S.Ct. 462, 33 L.Ed 970 (1890).

Army Regulation 635-40 recognizes Congress' intent that service persons in Petitioner's position be given a quasi-judicial hearing such as that envisioned in *Morgan* and *Chicago, Milwaukee & St. Paul Ry. Co.*, so long as he demands it.[10]

---

10. At 4-20h, the regulation provides that the soldier is entitled to counsel at the formal PEB. At 4-20e, under the heading "Soldier's rights", the regulations provide that the soldier may testify at the PEB, introduce evidence and witnesses, make unsworn statements, or remain silent, as he chooses. 4-20i provides for records review. 4-20j (2) states, "[t] he statutory right to a full and fair hearing includes the right to challenge for cause." 4-20k orders the PEB president to "assure himself or herself that the soldier has been informed of his or her rights." Perhaps the most important right of a soldier at a formal PEB, and certainly the

(Cont'd)

By denying Petitioner the right to this important procedural safeguard, the Army has ignored its own regulations and irreparably harmed Dr. Patterson. The Petitioner submits that the system has not failed; but rather that he has been unfairly denied access to the system. Petitioner should be granted a PEB hearing where he would have the opportunity to present evidence *de novo*.

III. DR. PATTERSON WAS IMPROPERLY DENIED HIS ADMINISTRATIVE DUE PROCESS RIGHTS.

The government maintains that the Petitioner is not entitled to a full and fair hearing as required by 10 U.S.C. § 1214 because, by implication, it is solely within the Army's discretion to decide whether to retire or separate a service member by reason of disability. As applied to the facts in this case, the government is wrong. In at least three separate government regulations, a PEB is mandated[11]. For example, in the government's own regulation, paragraph 8-4c of Army Regulation 635-40 at JA page 218 provides:

(Cont'd)
most important right denied to the Petitioner in this case, appears at 4-20o "Procedural objections. The soldier (the soldier's next-of-kin, legal guardian, or counsel) may object to any actions taken or proposed to be taken by the board or to the admission of evidence."

11. The government contends that Dr. Patterson never objected to not receiving a PEB at the ABCMR level. In fact, he did (see JA 182 and 185). As indicated at JA-182, "the U.S. Army failed to forward a medical board and *did not conduct a Physical Examination Board* in 1989. As a result of these administrative errors, *never considered by a Physical Evaluation Board*" (Emphasis Added). This was part of the ABCMR application. At JA 185, it states as part of the ABCMR application, "that because of an *administrative oversight, I was not considered by a Physical Evaluation Board in April 1989*" (Emphasis Added).

> "Upon the MEBD's decision and the medical reviewing authorities approval, that the reserve member has condition listed in chapter 3, AR 40-501, and meets the requirements of paragraph 8-2, the commander *will refer* the member to a PEB". Furthermore paragraph 4-13, AR 635-40, a states "The MEBD *will recommend referral* of members who do not meet retention standards to a PEB."[12]

(Emphasis Added)

The Army, in its own regulations, chose to use the word *will*, instead of may or should. The word "will" is a word requiring mandatory action, in this case, to refer the case to a PEB. Petitioner submits that it is plain error, and arbitrary and capricious, and a denial of due process for the government to ignore the provision of paragraph 8-4c, 4-11, and 4-13 of AR 635-40 requiring that the Petitioner's case be submitted to a PEB.

Furthermore, Petitioner was found unfit by the Medical Board under paragraph 3-21a(4), of Army Regulation 40-501. That regulation, at paragraph 3-3, also provides:

> Soldiers with conditions listed in this chapter will be evaluated by a medical board and WILL BE REFERRED TO A PHYSICAL EVALUATION BOARD (PEB) except for members of the Reserve Components not on active duty.[13]

---

12. *See* Army Regulation 635-40, paragraph 4-11 (JA-226).

13. However, 10 U.S.C. § 1215 members other than regulars: applicability of laws provides "laws and regulations that entitle any (Cont'd)

(JA-237). Consequently, it was a denial of due process of law for the Army to not provide a PEB.[14]

10 U.S.C. § 1214 provides for a *full* and *fair* hearing. Dr. Patterson received neither. The Department of Defense and the Department of Army implemented Department of Defense Directive 1332.18 and Army Regulation 635-40, with the specific intent to carry out the military's responsibility to provide a full and fair hearing as mandated by Congress. The army chose to ignore it's own regulations.

The government minimizes the administrative due process of a PEB as compared to the ABCMR. The ABCMR, while having the power to adjudicate cases and grant relief, does not provide the same procedural due process protection as provided by a PEB. The PEBs are full-time boards processing thousands of disability cases each year. Members on the PEB have extensive experience, knowledge, and are normally of sufficient seniority to appreciate the intricacies of military life and disabled soldiers. Army Regulation 635-40 provides at paragraphs 3-10a (3) (JA-224), 4-20 (generally) and 4-20 J. (2) (JA-228 through 230) that the PEB is to fulfill the Army's statutory

---

(Cont'd)
retired member of a regular component of the armed forces to pay, *rights*, benefits, or privileges extend the same pay, *rights*, benefits, or privileges to any other member of the armed forces who is not a member of the regular component and who is retired, or to whom retired pay is granted, because of physical disability" (Emphasis Added). This Statute was, by its clear meaning, designed to protect reservists such as Petitioner (who are not members of the regular component). Consequently, the exception cited in regulation is voided by the expressed intent of Congress as indicated in 10 U.S.C. § 1215.

14. *See also* DOD Directive 1332.18 paragraph D1. and D2. (JA-237 through JA-239).

mandate under 10 U.S.C. § 1214 to provide a full and fair hearing.

The government argues that the ABCMR procedure, under Army Regulation 15-185, pages JA 201 to JA 209 of the record, satisfies the full and fair hearing requirements of 10 U.S.C. § 1214. Dr. Patterson submits that the ABCMR procedure does not give a full and fair hearing as contemplated by the Fifth Amendment Due Process Clause, 10 U.S.C. § 1214, or Army Regulations implementing 10 U.S.C. § 1201, *et al.* In fact, the procedural due process provided by the ABCMR is a mere shadow of the rights afforded service members through the PEB process.

First, the burden of proof requirement at the ABCMR is greater on the Petitioner than at the PEB proceedings. Compare the burden at the ABCMR, which states "the board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material, error or injustice" paragraph 10b, AR 15-185 (JA-202), with the burden of proof at the PEB. Both the DOD Directive and the Army Regulation provides that the Government has to overcome the presumption of service aggravation by a preponderance of the evidence.[15]

On the other hand, at the ABCMR, the Petitioner must provide sufficient relevant medical evidence to demonstrate a probable material error or injustice. The burden of proof at a PEB level would be on the government to show by preponderance of the evidence that there was no service aggravation or injury, as opposed to it shifting to the Petitioner at the ABCMR.

---

15. *See* Army Regulation 635-40 2-2 (a)(1), (3), (4), and (5) and DOD Directive 10(b) and (c). (JA-222 and JA-242).

The following is a comparison of the procedural benefits provided to an Army service member at a PEB as opposed to the procedural rights at the ABCMR:

1. The PEB has three full-time officers whose job is to review military disability cases. One of the officers is a senior line officer with commander experience, another officer is required to be a trained medical doctor, and the third is a personnel officer.[16] Invariably, in military disability cases complicated medical issues require a doctor to sort through the complex medical issues involved in the cases. At both the informal level of the PEB and the formal level, a doctor participates in the three-member board panel. At the ABCMR, none of the members are required to have any military or medical training.

2. Rights to Counsel. At the PEB, the Army provides a free military lawyer. The appointed military counsel at the PEB is required to be a licensed attorney and to be a judge advocate general. It is a full-time position, whose exclusive military duties are to advise and fully represent service members in their PEB cases.[17] The entire Appendix C to 635-40 goes into extensive detail as the rights of soldiers, all of which were denied Dr. Patterson.[18] Additionally, the service member may elect, at his own expense, to have independent, civilian counsel. At the

---

16. *See* Army Regulation 635-40, paragraphs 3-10b. and c. (JA-224).

17. *See* Army Regulation 635-40, paragraph 3-10d (JA-215) and paragraphs 4-19 d.(3); (5); 4-20 e; f. (2); and especially paragraph 4-20h. of 635-40 (JA-224 and JA-228).

18. JA-232 through JA-236.

ABCMR, members are only authorized to bring their own lawyer at their own expense.[19]

3. While the service member's case is pending before a PEB, he is entitled to the assistance of a PEB Liaison Officer.[20] The ABCMR does not provide an individual to administratively assist the service member.

4. The PEB provides travel expenses for the service member and requires military witnesses to appear at the PEB. The ABCMR permits service members to bring witnesses, however those witnesses must be paid for at the service member's expense.[21]

5. At the PEB, if the service member requests a formal hearing, he receives one.[22] In fact, in this case, despite requesting a hearing at the ABCMR, he was denied a hearing.[23] The service member, if he requests a hearing, only receives one if, at the *discretion* of the ABCMR, they deem he is entitled to a hearing.[24]

---

19. JA-203.

20. *See* paragraph 3-12, AR 635-40, JA-225 and Appendix C 635-40 JA-232 through JA-236.

21. *See* Army Regulation 635-40, paragraph 4-20 d. (5)(c); 4-20 l. (3); and 4-20 n. (4) (JA-229).

22. *See* Army Regulation 635-40; paragraph 4-19 d. (3) and especially 4-20 a. (JA-228).

23. The Court of Claims was under the mistaken impression Petitioner did not request a hearing, but in fact he did by marking the ABCMR form at item 6. *See* footnote, 2, *infra*.

24. *See* Army Regulation 15-185, paragraph 11 (JA-203).

6. At the PEB, the service member has the right to several appeals. The first appeal is from the informal board to the formal PEB. Second, he can ask for reconsideration by the PEB. Third, he can appeal the decision to the Physical Disability Review Counsel and finally to the Army Disability Appeal Board.[25] At the ABCMR, he can only ask for a reconsideration to the same members who denied his case.[26]

Dr. Patterson submits that the process he received at the ABCMR did not provide a full and fair hearing as required by 10 U.S.C. § 1214. Furthermore, the Army itself has determined what a full and fair hearing is for military disability cases.[27] Army Regulation 635-40 details all of the rights that I have previously referred to: right of counsel, right of appeals, right to have a medical member review the case, right to have witness produced at government expense, and the right to have the government pay for the respondent's travel to the PEB. Because of the differences in the make-up of the board and the rights detailed above, provided to respondents, the frequency in which relief granted to service members is much greater at the PEB as compared to ABCMR. Approximately 50% of the disability cases presented to the PEB find favorably for military service members. On the other hand, because of the lack of procedural protection, greater burden of proof, and lack of meaningful logistical assistance, significant relief at the ABCMR on disability cases is less than 5%.

---

25. *See* Paragraph 4-21 AND 4-22 of Army Regulation 635-40 (JA-232).

26. (JA-203).

27. *See* paragraphs 1-1 (JA-221); 3-1 (JA-223); 4-19 (JA-228); and 4-20 (JA-228 through JA-231) of Army Regulation 635-40.

Just because there are multiple boards available to provide relief to service members, this does not mean that Congress's intent was met by providing the least amount of procedural rights at the ABCMR as opposed to the PEB. While the ABCMR may be adequate to grant relief for a service member, it is woefully inadequate to fully protect the procedural rights of disabled soldiers when Congress specifically intended to provide a full and fair hearing as contemplated by 10 U.S.C. § 1214.

The government has argued below that *Norman v. United States*, 392 F.2d 255 (Ct. Cl. 1968) and *Wyatt v. United States* 2 F.3d 398 (Fed. Cir. 1993) stand for the proposition that there is no vested right to military disability retirement. *Norman* involved the "White Charger Act", which required early mandatory removal of 20% of officers who were twice passed over for promotion. This law modified an earlier act of Congress, which provided "service members had guaranteed tenure to a certain number of years." The "White Charger Act" caused a portion of those officers to lose their tenure. The court held, in that case, that because Congress modified the statute by passing a subsequent law, their rights became unvested. In this case, there has been no subsequent statute that reduces military disability rights or provides less procedural due process than in the original Statute. On the other hand, the military disability statutes have been modified over the years to provide for increased coverages for varying groups of service members, including reservists.

Under *Wyatt v. United States*[28], Congress interpreted 37 U.S.C. § 307(a), discretionary provision to reduce or abolish proficiency pay. Again, in that case, there were subsequent statutes modifying earlier statutes to reduce certain benefits.

---

28. *Id.*

This case is more closely related to *Larionoff v. United States*, 431 U.S. 863, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977). *Larionoff* involved the attempted elimination of re-enlistment bonuses by the military based on subsequent statutes. The Supreme Court of the United States held that subsequent statutes did not show any intention on the part of Congress to eliminate their benefits.

Larionoff also stands for the proposition that a soldier's entitlement to pay is dependent upon statutory rights, *See also Bell v. United States*, 366 U.S. 393, 401, 81 S. Ct. 1230, 1245, 6 L. Ed. 2d 365 (1961). As in this case, *Larionoff* involved the interpretation of service regulations and implementing statutes, as well as a Department of Defense Instruction. Petitioner submits that since it was the clear intention of Congress to provide for a full and fair hearing, to provide less than a full and fair hearing would be in conflict with the Congressional intent. *See Larionoff*, at 431 U.S. 877, 91 S. Ct. at 2158.

The government in briefs submitted below improperly relies on the decision in *Sawyer v. United States*, 930 F.2d at 1581-1582 for the proposition that no PEB is required to meet the full and fair mandate of 10 U.S.C. § 1214. In fact, in *Sawyer*, the Petitioner not only had a PEB, but had his case reviewed by the Central Physical Evaluation Board (CPEB) and then by the Regional Physical Evaluation Board (RPEB). Finally, it was reviewed by the Physical Review Counsel (PRC) before going to the BCNR (Board of Correction Navy Records). The BCNR in the *Sawyer* case, after having the benefit of three previous Navy Board reviews, affirmed those reviews in denying Sawyer's claim. The Court of Claims reversed the BCMR, and the Appeals Court reversed the Court of Claims. Even though Sawyer lost his case, he, unlike Dr. Patterson, was afforded all

of his Constitutional, statutory, and administrative due process rights. Petitioner submits that this Honorable Court did not intend *Sawyer* to stand for the proposition that no PEB be conducted, but rather that the BCMR (the Navy equivalent to the ABCMR) could grant the same relief as a PEB. The Army having chosen by regulation to give Petitioner the right to a PEB cannot abrogate that right, merely because it lost the Petitioner's records.

The government also cites *Ferrell v. United States*, 23 Cl. Ct. 562 (1991), also for the proposition that the ABCMR can grant the same relief as a PEB, therefore, by implication, that there is no need for a PEB. However, in *Ferrell*, as in this case, the Air Force Board of Correction Military Records (AFBCMR) refused to provide a PEB or grant relief. After a second remand, the Court of Claims granted disability. The ABCMR or BNCR or AFBCMR can grant the same relief, but those boards do not replace a PEB when the PEB's are mandated by the service's own regulations.

It is interesting to note that all of the military doctors who were involved in this case, four doctors at the Medical Evaluation Board in April 1989 and years later, the Surgeon General of the United States Army, opined that they either recommend consideration of the case to a PEB or that, in the case of the Surgeon General (TSG), the Petitioner's appeal be favorably considered. The Government argued that the Surgeon General has little role to play in this process. Their own regulation says otherwise.[29] Only non-medical personnel, less familiar with the complex medical issues in this case, recommended disapproval of Petitioner's claim.

---

29. Paragraph 3-5, Army Regulation 635-40 states "TSG is responsible for setting up the interpret medical standard for retaining soldiers on active duty." (*See* AR 40-3 and AR 40-501) (JA-224).

It is troubling that the government has instituted a requirement on soldiers that they prove negligence in order to received disability. The military disability system is supposed to be no-fault and non-adversarial. (compare for example, paragraphs 4-20(c) "Avoid an implication of litigation of the case" (JA-229) with the ABCMR decision (JA-127) concerning requirement of proof of negligent acts). By requiring proof of fault, i.e. negligence, the government now is making the system, which has worked well for almost fifty years as a no-fault system, into an adversarial system. Soldiers cannot sue for negligent acts by their superiors or by active duty medical professionals as dictated by the Feres Doctrine. (*Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95, L. Ed. 152 (1950)). Consequently, the no-fault system, which has been proven effective over almost five decades as being a fair and reasonable way to compensate injured soldiers, is being undermined. Soldiers must now prove medical malpractice to obtain disability. That is not good for the military, not good for the service member, and not the intent of Congress.

Soldiers, sailors, marines, and Air Force personnel should be treated as first class citizens. Military service members give up many of their Constitutional and statutory rights when they enter onto active duty. Their remaining due process rights, which are designed to protect them, should not be curtailed.

All parties agree that Dr. Patterson suffered tragically due to incidents that occurred in April 1989, while he was on military duty. Petitioner submits that it was a denial of his Constitutional, statutory and regulatory rights for the Army not to have afforded him a PEB when he requested it.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHUCK R. PARDUE
PARDUE & ASSOCIATES, PC
Attorneys for Petitioner
563 Greene Street
Augusta, Georgia 30901
(706) 823-2000

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITIONERS CLAIM DATED AND FILED JUNE 12, 2000

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

99-5151

DR. WILLIAM G. PATTERSON, JR.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS in CASE NO(S). 98-CV-472

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (CLEVENGER, RADER, and BRYSON, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly, Clerk
Jan Horbaly, Clerk

DATED June 12, 2000

ISSUED AS A MANDATE: AUGUST 3, 2000

APPENDIX B — OPINION OF THE UNITED STATES COURT OF CLAIMS DATED AND FILED AUGUST 11, 1999

UNITED STATES COURT OF FEDERAL CLAIMS

No. 98-472C

(Filed: August 11, 1999)

Military pay; Disability; Service connection; Waiver of non-appealed issues.

DR. WILLIAM G. PATTERSON,

Plaintiff,

v.

The UNITED STATES,

Defendant.

OPINION

* * *

BRUGGINK, *Judge.*

This is an appeal from a denial by the Army Board for Correction of Military Records ("ABCMR" or "Board") of plaintiff's request that his discharge status be changed to a medical disability retirement. The matter is pending on the parties' cross-motions for summary judgment. The primary

issue is whether plaintiff's disability was incurred during, or aggravated by, his service in the armed forces. Oral argument was held on August 4, 1999. For the reasons set out below, defendant's motion is granted.

BACKGROUND

Plaintiff was a dentist in the United States Army Reserve. In April, 1989, he was fulfilling his annual training commitment at Fort Leonard Wood, Missouri. While on duty on April 2, he went to the emergency room, complaining of acid reflux and tenderness in the chest. He underwent a stress test with an EKG monitor. The EKG reading had some slight abnormality. He was diagnosed at that time with probable atherosclerotic heart disease. It was recommended that he undergo a heart catheterization through a private physician to rule out any underlying disease.

It is undisputed that Dr. Patterson underwent a catheterization in the Army hospital, and that it revealed "high grade stenosis of the obtuse marginal branch and right coronary artery branch." He now asserts that the catheterization was involuntary. While he was on the catheterization table, "he developed unstable angina that was refractory to medical therapy. It was determined that he would need emergent per cutaneous transluminal coronary angioplasty." During arteriography, however, "he developed asystole and required cardiopulmonary resuscitation. He was taken . . . to the Operating Room while cardiopulmonary resuscitation was being performed for emergent coronary artery bypass graft." Three bypass grafts were performed. The medical notes of the bypass procedure contains the following: "Attention was first turned to the left anterior

descending. This was bypassed because it was felt that there was a chance that there was a dissection in the left main coronary, even though it had not been abnormal on the catheterization study."

After surgery, his prognosis was "grim," and it was judged he might not survive surgery. In short, Dr. Patterson nearly died. Steps were taken almost immediately to convene a Physical Evaluation Board ("PEB") to consider retiring him on disability. For reasons not clear in the record, such a board was not convened, however.

Fortunately, he did survive, although he suffered impairments from which he has not fully recovered. He reported in September 1989 that he had hearing loss, gastric distress, and rib and sternum pain. The results of three post-surgery examinations are in the record. On May 16, 1993, plaintiff reported that he is "presently [in] good health," although he was undergoing cardiac rehabilitation. An examination that date resulted in an assessment of his condition in terms of various physical attributes. He received a "1", or highest rating, in four of the six categories. He received a "3", denoting restrictions on assignment because of limitations of physical capacity or stamina, and a "2" on eyesight. He had received a similar rating in the physical capacity category in 1991. It was noted at that time that he could "exercise at his own pace," and that his profile did not interfere with his primary responsibilities.

Plaintiff applied to the ABCMR on February 2, 1994, for a medical disability retirement with a 100% rating, asserting that he had been injured during the angioplasty

procedure. He did not specify the precise nature of the injury and resulting disabilities, however. In a cover letter for the application, his attorney states that he had "significant coronary artery disease, [but] the injury he sustained as a result of both the cardiac catheterization and the angioplasty greatly aggravated his heart condition and lead to strokes." It was also asserted that these procedures lead to the cardiac arrest and some subsequent brain damage.

Prior to its resolution of the petition, the Board sought the input of the Surgeon General of the Army's Cardiology and Neurological Consultants. That office advised that the plaintiff did not meet the medical retention standards at the time of his retirement in 1993, nor at the time of his surgery in 1989. The Board also was advised by the Physical Disability Agency ("PDA") that the plaintiff had a pre-existing coronary disease; that the cardiac arrest condition was the main result of his prior existing heart disease and not the proximate result of the catheterization; and that no negligent acts were committed by Army medical personnel. The PDA advised that in its view the legal standards for compensation had not been met.

The ABCMR decided that plaintiff had not established that his infirmities, even if disabling, were the proximate result of performing duty. *See* Army Regulation ("AR") 635-40, § 8-2(a). The Board found that plaintiff's "high-grade stenosis of the circumflex artery and the right coronary artery . . . existed prior to his entry on active duty and was not the proximate result of his performing military duty." The Board viewed the catheterization and angioplasty as "[s]tandard in-service medical and surgical treatment

reducing the effect" of what it found was a pre-existing disease condition- arteriosclerosis. The Board further found no evidence that "the catheterization process was the main cause of the cardiac arrest condition," that the result was "outside the normally accepted inherent risks of such a procedure," or that there were "any negligent acts committed by medical personnel that caused this arrest."

This action was filed on June 2, 1998.

DISCUSSION

Decisions regarding entitlement to disability retirement are not considered de novo by this court. The agency action, in this case embodied in the decision of the ABCMR, is given deference. The role of the court is not to determine whether in fact the service person's unfitness, if any, at the time of release was service connected, but whether the board's determination that it was not is contrary to law. *See Johnston v. United States*, 157 Ct. Cl. 474, 478 (1962). The board's decision can be overturned only on a showing that it was "illegal because it is was arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced." *Sanders v. United States*, 219 Ct. Cl. 285, 298 (1979).

As more fully amplified at oral argument, plaintiff advances four independent arguments: 1) it was error not to convene a PEB prior to denying his application for disability retirement; 2) the catheterization was performed over

plaintiff's objection, and hence all the results of the catheterization, were per se "service connected;" 3) it was error for the Board not to find that the accidental dissection of the left main coronary artery aggravated the pre-existing heart condition; and 4) the Board erred as a matter of law in not concluding that plaintiff's heart attack and related neurological injuries are the "unexpected adverse effect" of the catheterization, independent of any possible accidental or negligent dissection. The court disagrees on all four counts.

Plaintiff argues that it was legal error to deny him disability retirement without convening a PEB. Plaintiff points to no statute or regulation to support the proposition that it was error not to convene a PEB. It may be true, as plaintiff asserts, that a Medical Evaluation Board and then a PEB are normally convened before a service person is discharged on disability retirement under 10 U.S.C. § 1201 (1994). And it is true, as the Board stated, that "there must be a determination by a PEB that the unfitting condition was the proximate result of performing duty" in the case of service persons performing duty for less than a thirty-day period. AR 635-40. The fact that the military will not grant a disability retirement without a PEB does not, however, mean that it cannot deny one without a PEB. Not all military regulations are for the benefit of the service person. *See Allgood v. Kenan*, 470 F.2d 1071, 1073 (9th Cir.1972). Moreover, as defendant points out, the ABCMR can make disability determinations in the first instance. *See Sawyer v. United States*, 930 F.2d 1577, 1581 (Fed.Cir.1991). The mere fact, therefore, that at a time when it appeared plaintiff's

prospects were "grim" a PEB was contemplated, does not demonstrate any legal error.[1]

Plaintiff alleges, with no citation to the record put before the ABCMR, that the catheterization subsequently performed in the Army hospital on April 13, 1989, was performed involuntarily. This allegation was not made in counsel's argument to the ABCMR. Support in the present record appears for the first time in Col. Patterson's own affidavit and that of Celeste Ackerman, a retired nurse who attended his catheterization.[2] There is no explanation offered as to why the alleged involuntariness of the procedures could not have been argued to the ABCMR. That issue is therefore waived. *See Doyle v. United States*, 220 Ct. Cl. 285, 311 (1979).

More importantly, this assertion has no direct bearing on the question of whether plaintiff's disability was service connected. Stripped to its essentials, plaintiff is arguing that, irrespective of his pre-existing condition, the fact that the

---

1. The court notes, moreover, that plaintiff had the right to, and did, supplement the record before the ABCMR, and could have, but did not, ask for a personal appearance before the Board.

2. The record the court reviews is normally the one considered by the board. *Long v. United States*, 12 Cl. Ct. 174, 175 (1987). Although the *Long* decision recognized that supplementation of the administrative record is viewed more favorably in medical disability cases, it clearly suggests that the rationale for doing so is because medical conditions may change, thus revealing relevant evidence that is "newly discovered or was unavailable during the administrative review." *Id.* at 176 n.1. The affidavits submitted by plaintiff do not contain the type of evidenced considered under this exception.

Army performed these medical procedures is enough to show a service connection. We disagree. Assuming plaintiff was ordered to undergo catheterization over his objection, that fact alone would not make the result of treatment "service connected." In other words, unless the Board's decision — that his disability resulted from a pre-existing, non-service-connected condition, and was not a result of duty-related aggravation of that pre-existing condition — is reversible for other reasons, it is not reversible solely on that basis.

The ABCMR was not presented with the precise allegation that the catheter "operator . . . misguided a catheter and dissected Dr. Patterson's left main coronary artery which caused a cardiac arrest." Complaint at 3. It apparently understood the factual assertion, because it held, nevertheless, that there were "no negligent acts committed by medical personnel that caused this arrest." On appeal, plaintiff contends that it is unnecessary to make a finding of negligence to award him disability compensation. He contends that the Board's error lies in its failure to find, first, as a matter of fact that the artery was accidentally dissected and that this aggravated the pre-existing condition, leading to the cardiac arrest; and second, to hold as a matter of law that, if this happened, it was not an "[u]nexpected adverse effect, over and above known hazards" implicit in catheterization. *See* AR 635-40.

Plaintiff contends that the record already in place is sufficient to demonstrate that the fact finding was in error.[3]

3. In neither of the affidavits accompanying the complaint is there any additional support for the statement in the complaint that (Cont'd)

Plaintiff does not offer new information to support this argument. Instead, he relies on two notations in the medical record before the ABCMR. The first is a reference in the operation report to "significant coagulapathy" and "significant hemorrhage" from the sternum, particularly the left part of the manubrium. There was reference to a bleeding vessel. In addition the operating report reflects that "the left anterior descending . . . was bypassed because it was felt that there was a chance that there was a dissection in the left main coronary, even though it had not been abnormal on the catheterization study."

From this plaintiff concludes that there was massive bleeding and that there is a "high probability" that there was accidental injury to the left main coronary because of the catheterization. If this indeed occurred, then, plaintiff argues, this was an unexpected adverse result within the meaning of the applicable regulation. The Board rejected this analysis, although it is not clear whether it concluded that, even if things happened as plaintiff suggests, it was not an unexpected adverse result, i.e., it is one of the risks inherent in catheterization that accidental dissections will occur, and/or that an accidental dissection did not occur. The Board's summary finding that the cardiac heart arrest was the "main result of his prior existing heart disease and nothing that occurred during his active duty period can be said to have been the main cause of his arrest and permanent impairment," suggests that the Board concluded that, if there

---

(Cont'd)

"[a]s a result of the catheterization, Dr. Patterson suffered a heart attack and stroke, and had temporary and permanent neurological damage, [and] damage to his heart."

was a dissection, it was not an aggravating cause of his impairment. Whatever happened after he was diagnosed with arteriosclerosis was of insufficient independence in terms of causation to break, or add significantly to, the link between the cardiac arrest and the pre-existing condition.

Plaintiff offers no real basis for the court to disagree with this conclusion, or to find that it is arbitrary, capricious, or not in accordance with law. The regulation itself does not force a conclusion that bleeding resulting from an accidental dissection of a vessel is per se an aggravating cause. Nor does the court have any basis for rejecting the Board's implicit finding that the possible dissection did not contribute sufficiently to the cardiac arrest. Reversing on that basis would require substantially greater certainty than that afforded by the record.

Plaintiff argues in the alternative that, even if there was no dissection, negligent or accidental, cardiac arrest and neurological damage are not an "expected" result of catheterization or angioplasty, thus, by definition they are "unexpected," and make the consequent disability service connected. The Board concluded that "there is no evidence that [cardiac arrest condition] is outside the normally accepted inherent risks of such a procedure," adverting to the applicable regulation, AR 635-40. The Board thus did not hold that plaintiff's difficulties were "expected." It held that they were within the scope of the risk inherent in the medical procedures. The court has no basis to dispute, much less find legal error in the Board's application of the appropriate regulation to the medical procedures employed here.

Appendix B

CONCLUSION

There is no question that plaintiff has suffered tragically. The court is not, however, empowered to substitute its judgment for that of the Board that his injuries were not service related in the sense required by law. Accordingly, plaintiff's motion for summary judgment is denied. Defendant's motion is granted. The clerk is directed to dismiss the complaint. No costs.

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Judge

APPENDIX C — THE ARMY BOARD OF CORRECTION OF MILITARY RECORDS DECISION DATED SEPTEMBER 29, 1997

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF
MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON, VA 22202-4508

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: PATTERSON, WILLIAM
245-74-0742

BOARD DATE: 29 OCTOBER 1997
DOCKET NUMBER: AC94-11893

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present:

Mr. Samuel A. Crumpler	Chairperson
Mr. George D. Paxson	Member
Ms. Tina L. Street	Member

Also present, without vote, were:

Mr. Karl F. Schneider	Acting Director
Mr. Ed Clark	Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairperson on the above date. In accordance with Army Regulation

Appendix C

15-185, the application and the available military records pertinent to the corrective action requested were reviewed to determine whether to authorize a formal hearing, recommend that the records be corrected without a formal hearing, or to deny the application without a formal hearing if it is determined that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A – Application for correction of military records
Exhibit B – Military Personnel Records (including advisory opinion, if any)

APPLICANT REQUESTS: That his military records be corrected to show that he was retired in April 1989 with a 100 percent disability rating.

APPLICANT STATES: That he suffered from injury and near death as a proximate cause of his military service due to complications from an angioplasty performed at Fitzsimons Army Medical Center (FAMC); and that he should have been referred for disability processing. In support of the application, he submitted documents labeled exhibit 1 through 29.

Appendix C

COUNSEL CONTENDS: That the essence of this claim is that the applicant should be entitled to disability compensation for the injury that he sustained during the [medical] procedures (cardiac catherization and angioplasty) as opposed to a disability rating for his underlying coronary artery disease; that he was essentially dead and revived through emergency procedures; and that the injury he sustained during the treatment process (heart and brain damage) was proximately caused by his military service.

Dortland's Medical Dictionary describes an angioplasty (percutaneous transluminal) as a procedure for elimination of areas of narrowing in a blood vessel. It consists of the dilation of a vessel by means of a balloon catheter inserted through the skin and through the opening of a blood vessel to the site of the narrowing, where the balloon is inflated to flatten plaque against the artery wall.

Cardiac catheterization is described in the aforementioned dictionary as the passage of a small catheter through a vein in an arm or leg or the neck and into the heart, permitting the securing of blood samples for the determination of intracardiac pressure, and detection of cardiac anomalies.

An issue in this case is the pre-existence of arteriosclerosis which is described in *The Merk Manual, Sixteenth Edition*, as a generic term for a number of diseases in which the arterial wall becomes thickened and loses elasticity (during the aging process). With its effects upon the brain, heart, kidneys, and other vital organs, and extremities, vascular disease is the leading cause of morbidity and mortality in the USA and in most Western countries, with almost

Appendix C

1 million deaths in the USA in 1986 (twice as many as from cancer and 10 times those from accidents). Despite progress in prevention and treatment of coronary artery disease resulting in a 23.3 percent reduction in age-adjusted death rates between 1977 and 1987, atherosclerotic (the most common form of arteriosclerosis) heart disease and stroke remain the number one killer.

EVIDENCE OF RECORD: The applicant's military records show:

He was serving with the Army Reserve in the rank of lieutenant colonel in an active duty for training status for a two-week period (1 through 14 April 1989) as a dentist (orthodontist) at Fort Leonard Wood (FLW), Missouri, during the period of time in question.

A Medical Board (MEBD) Narrative Summary shows that after complaining of chest pain and being treated twice at the emergency room at FLW (on 2 and 4 April), he was transferred to FAMC where he underwent a cardiac catherization procedure on 13 April 1989. While on the catherization table, he suffered cardiac arrest (sudden cessation of heart function) and, while undergoing resuscitation, he was transferred to the operating room for a coronary artery bypass graft operation. The diagnoses are shown, in part, as arteriosclerotic heart disease manifested by high grade stenosis (narrowing) of the circumflex artery and the right coronary artery. The document contains the statement "His prognosis is grim and he may not survive surgery. [His records are] therefore referred to the physical evaluation board [PEB]."

Appendix C

The available medical records indicate that he did not undergo a PEB.

The available records show that on 11 July 1992 he was issued a temporary physical profile with a numerical designator 3 in the P factor along with appropriate assignment limitations (no running, jumping etc.). He was permitted to walk at his own pace and distance, and to bicycle at his own pace and distance. Subsequent profiles, which were permanent, issued on 18 October 1992 and 30 March 1993, were essentially the same.

A 9 February 1993 memorandum shows that his Reserve commander notified him that he was initiating action to separate him from the Army Reserve because of "repetitive failure of the Army Physical Fitness Test (APFT)."

On 27 January 1997 the Board was advised (COPY ATTACHED) by The SurgeonGeneral's Cardiology Consultant and his Neurology Consultant that the applicant did not meet medical retention standards at the time of his retirement in 1993, nor at the time of his surgery in 1989.

On 17 March 1997 the Board was advised (COPY ATTACHED) by the Physical Disability Agency (USAPDA) that the applicant had pre-existing coronary disease; that the cardiac arrest condition was the main result of his prior existing heart disease and not the proximate result of performing military duty; that although his cardiac arrest was unfortunate, there is no evidence to establish that the catherization process was the main cause of that arrest, nor is there any evidence that this result is outside the normally

accepted inherent risks of such a procedure; and that there were no negligent acts committed by medical personnel that caused this arrest. The USAPDA further advised that although this case may be emotionally difficult to assess and at first glance may appear to be reasonable, the applicable legal standards for the award of compensation have clearly not been met in this case. Denial of the application was recommended.

Army Regulation 635-40, Physical Evaluation for Retention, Retirement, or Separation, Chapter 8, Reserve Components, paragraph 8-3, provides that in order for soldiers of the Reserve Components to be compensated for disabilities incurred while performing duty for 30 days or less, there must be a determination by a PEB that the unfitting condition was the proximate result of performing duty. Proximate result establishes a causal relationship between the disability and the required military duty. Title 10, United States Code, Section 1204, provides, in part, that upon determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that the disability is the proximate result of performing active duty or inactive-duty training or of traveling directly to or from the place at which such duty is performed.

Paragraph 3-3a, b, and c of the foregoing regulation provides that according to accepted medical principles, certain abnormalities and residual conditions exist that, when

discovered, lead to the conclusion that they must have existed or have started before the individual entered military service. Standard in-service medical and surgical treatment reducing the effect of the disease or other conditions incurred prior to entry into military service does not constitute service aggravation unless the treatment was required to relieve disability that had been aggravated by military service. Unexpected adverse effects, over and above known hazards, directly attributable to treatment, anesthetic, or an operation performed or administered for a disease or medical condition existing before entry on active duty, may be considered service aggravation.

An individual serving in the Army Reserve routinely performs Reserve duty 38 days each calendar year, the equivalent of 12 weekend training assemblies and 14 days annual training.

DISCUSSION: Considering all the evidence, allegations, and information presented by the applicant, together with the evidence of record, applicable law and regulations, and advisory opinions, it is concluded:

1. The applicant was serving on active duty for a scheduled period of 14 days during the time in question. Since he was not on active duty for over 30 days, both law and regulation require that there must be a determination that any impairment that he incurred was the proximate result of performing military duty.

2. The applicant sought medical attention for signs and symptoms of his medical condition, arteriosclerosis —

described in the MEBD Narrative Summary as high grade stenosis of the circumflex artery and the right coronary artery, 1 day after beginning his 14 day training period. Clearly, the condition existed prior to his entry on active duty and was not the proximate result of his performing military duty.

3. With regard to counsel's contention that the applicant should be awarded compensation for residuals of the medical procedures performed on the applicant at the time, there is no evidence which would indicate that the catherization process was the main cause of the cardiac arrest condition, nor is there any evidence that this result is outside the normally accepted inherent risks of such a procedure. There were no negligent acts committed by medical personnel that caused this arrest and it was not the proximate result of performing military duty. His cardiac arrest was the main result of his prior existing heart disease and nothing that occurred during his active duty period can be said to have been the main cause of his arrest and present impairment. Accordingly, the unfortunate residuals experienced by the applicant do not meet the criteria for service aggravation.

4. The foregoing is supported by the advisory opinion provided by the USAPDA.

5. In view of the foregoing, there is no basis for granting the applicant's request.

DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice.

Appendix C

SFMR-RBR – 1st End (29 Oct 97, Docket Number AC94-11893)
SUBJECT: ABCMR Memorandum of Consideration

HQDA, ABCMR, Arlington, Virginia 22202-4508 7 Nov 97

TO: US Army Review Boards Agency Support Division – St. Louis
ATTN: SFMR-RBR-SL, 9700 Page Avenue, St. Louis, Missouri 63132-5200

1. The application submitted by the individual concerned has been denied by the Army Board for Correction of Military Records.

2. Prior to closing out the case, please refer to any Note contained in the Determination portion of the Board's Memorandum of Consideration, and take such administrative action as may be contained therein.

s/ Karl F. Schneider
Karl F. Schneider
Acting Director

BOARD VOTE:

____ ____ ____ GRANT

____ ____ ____ GRANT FORMAL HEARING

____ [illegible] ____ DENY APPLICATION

s/ [illegible] for
Karl F. Schneider
Acting Director

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

(2)

No. 00-376

In the Supreme Court of the United States

WILLIAM G. PATTERSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JOHN C. HOYLE
JAMES M. KINSELLA
KATHERINE M. KELLY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15pp

QUESTION PRESENTED

Whether a member of the United States Army Reserve whose claim for disability retirement benefits has been fully considered by the Army Board for Correction of Military Records was also entitled to a hearing before a military Physical Evaluation Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Board of Regents v. *Roth*, 408 U.S. 564 (1972)	8
Brown v. *United States*, 396 F.2d 989 (Ct. Cl. 1968)	6
Burns v. *United States*, 9 Cl. Ct. 273 (1985)	10
Charles v. *Rice*, 28 F.3d 1312 (1st Cir. 1994)	6
Ferrell v. *United States*, 23 Cl. Ct. 562 (1991)	9
Lyng v. *Payne*, 476 U.S. 926 (1986)	9
Norman v. *United States*, 392 F.2d 255 (Ct. Cl. 1968), cert. denied, 393 U.S. 1018 (1969)	9
Powell v. *Marsh*, 560 F. Supp. 636 (D.D.C. 1983)	7
Quailes v. *United States*, 25 Cl. Ct. 659 (1992)	6
Sawyer v. *United States*, 930 F.2d 1577 (Fed. Cir. 1991)	8, 10
United States v. *Larianoff*, 431 U.S. 863 (1977)	9
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)	9
Wyatt v. *United States*, 2 F.3d 398 (Fed. Cir. 1993)	9

Constitution, statutes and regulations:

U.S. Const.:	
Amend. V	6, 9
Due Process Clause	9
10 U.S.C. 1204 (1994 & Supp. IV 1998)	2, 5, 9
10 U.S.C. 1214	2, 6, 7

Regulations—Continued: Page

Army Reg.:
Reg. 15-185:
§ III, ¶¶ 10d-10f 10
§ VI:
¶ 21b 10
¶ 22 10
§ VIII, ¶ 27b 11
Reg. 40-501, ¶ 3-21(a)(4) .....
Reg. 635-40 6
§ 8-2(a) 5
¶ 2-2 10
¶ 2.3(a)-(c) 10

In the Supreme Court of the United States

No. 00-376

WILLIAM G. PATTERSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 1a-2a) is not yet reported. The opinion of the Court of Federal Claims (Pet. App. 3a-13a) is reported at 44 Fed. Cl. 468. The opinion of the Army Board for Correction of Military Records (ABCMR) (Pet. App. 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2000. The petition for a writ of certiorari was filed on September 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title 10 of the United States Code, Section 1204 governs the eligibility for physical disability retirement of members of the armed forces who are on active duty for periods of 30 days or less. This statutory provision requires, among other things, that to be eligible for disability retirement, the service member must be "unfit to perform the duties of his office, grade, rank, or rating because of physical disability," and must have incurred that disability as the "proximate result of performing active duty or inactive-duty training." 10 U.S.C. 1204 (1994 & Supp. IV 1998). In addition, 10 U.S.C. 1214 provides the procedural safeguard that, "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." Section 1214 is relevant only when a branch of the armed forces takes action to involuntarily retire or separate a service member on the basis of a physical disability.

2. Petitioner began serving as a dentist in the United States Army Reserve on November 24, 1977. C.A. App. 138-139, 149. While attending his annual duty training from April 1, 1989 to April 14, 1989, petitioner sought medical attention from Army medical staff for chest pain and was diagnosed with probable heart disease. Pet. App. 4a, 17a. On April 13, 1989, petitioner underwent a cardiac catheterization and angioplasty at Fitzsimons Army Medical Center. *Id.* at 17a. During the procedure, petitioner went into cardiac arrest. *Ibid.* Petitioner was resuscitated and underwent immediate coronary artery bypass surgery. *Ibid.*

Before a service member may be retired or separated for physical disability, he is entitled to a hearing on request. 10 U.S.C. 1214. Because of petitioner's critical

medical condition, an expeditious retirement for the benefit of his family was under consideration, and toward that end a medical evaluation board (MEB) was convened while petitioner was still undergoing bypass surgery. C.A. App. 29. The Medical Board Narrative Summary stated that petitioner's "prognosis is grim and he may not survive surgery. [His records are] therefore referred to the physical evaluation board [PEB]." Pet. App. 17a.

Petitioner's records do not indicate that a Physical Evaluation Board was ever convened, or that petitioner ever requested a Physical Evaluation Board hearing after April 14, 1989. Pet. App. 18a; see Pet. 14 (noting only that petitioner's wife requested a PEB during his bypass surgery).

Petitioner continued his service as a dentist in the Army Reserve long after his surgery in April 1989. See, *e.g.*, C.A. App. 70. His records show that he was assigned to periods of active duty in July 1990, August 1993, and July 1994 (*id.* at 152, 156, 161-162), earned retirement credits for various periods of time from November 1989 through November 1993 (*id.* at 149), and had assignments to perform military duties as a dentist during periods from July 1989 to October 1993. *Id.* at 140. In fact, petitioner was promoted to the rank of Lieutenant Colonel on August 24, 1991. *Id.* at 160.

On September 10, 1996, petitioner was not selected for promotion to the rank of Colonel. C.A. App. 30. On June 25, 1997, he was not selected for retention, resulting in his retirement. *Id.* at 31. Nothing in petitioner's records indicates that physical disability was the reason for either of these decisions.[1] *Id.* at 30-31.

---

[1] The only reference in the record to his physical condition in regard to potential retirement or separation is a reference in the

3. On February 2, 1994, while petitioner was still serving in the Army Reserve, he had filed an application with the Army Board for Correction of Military Records (ABCMR) requesting that his military records be corrected to "show that he was retired in April 1989 with a 100 percent disability rating."[2] Pet. App. 15a; see also *id.* at 5a. Petitioner alleged that "he suffered from injury and near death as a proximate cause of his military service due to complications from an angioplasty performed at Fitzsimons Army Medical Center (FAMC); and that he should have been referred for disability processing." *Id.* at 15a.

The ABCMR denied petitioner's application in a decision dated October 29, 1997. Pet. App. 14a-22a. The ABCMR concluded that there "were no negligent acts committed by medical personnel that caused this arrest and it was not the proximate result of performing military duty. His cardiac arrest was the main result of his prior existing heart disease and nothing that occurred during his active duty period can be said to have been the main cause of his arrest and present impairment." *Id.* at 21a. Because petitioner failed to show that his alleged disability was the

---

ABCMR decision to a February 9, 1993 memorandum by his Reserve commander notifying petitioner that he was initiating action to separate him from the Army Reserve because of repetitive failure of the Army Physical Fitness Test, and not mentioning any physical disability. Pet. App. 18a. Petitioner continued to serve in the Army Reserve for nearly five years after the date of this memorandum. C.A. App. 31.

[2] His ABCMR application is somewhat misleading because it states that his date of discharge or release from active duty was February 9, 1993 (C.A. App. 130), but instead, petitioner's records show that he continued to perform Reserve duties at least four years after that. *Id.* at 140, 152, 156.

"proximate result of performing active duty or inactive-duty training," the Board held that he was not entitled to prevail under 10 U.S.C. 1204 (1994 & Supp. IV 1998) or Army Regulation (AR) 635-40, § 8-2(a).[3]

4. On June 2, 1998, petitioner filed a complaint in the United States Court of Federal Claims challenging the ABCMR decision. Pet. App. 7a. In its opinion, filed August 11, 1999, the Court of Federal Claims sustained the ABCMR decision, finding that (1) it was not legal error for the ABCMR to deny petitioner disability retirement without convening a PEB; (2) petitioner waived any argument that his April 1989 heart catheterization was performed involuntarily because he had not raised that issue to the ABCMR; (3) in any case, the assertion of involuntariness had no direct bearing on whether his disability was service connected; (4) the ABCMR did not commit factual error by failing to find that an artery in petitioner's heart had been severed during medical procedures performed upon him; and (5) the ABCMR did not commit legal error in concluding that there was no evidence that petitioner's cardiac arrest was outside the normally accepted inherent risks of catheterization or angioplasty, pursuant to AR 635-40. Pet. App. 3a-13a.

5. The United States Court of Appeals for the Federal Circuit entered judgment without an opinion

---

[3] The U.S. Army Physical Disability Agency, in its advisory opinion to the ABCMR, also concluded that there was no evidence to establish that the catheterization process was the main cause of petitioner's cardiac arrest, nor was there any evidence that this result was outside the normally accepted inherent risks of such a procedure. Pet. App. 18a-19a. Accordingly, the Physical Disability Agency advised that "the applicable legal standards for the award of compensation have clearly not been met in this case." *Id.* at 19a.

on June 12, 2000, affirming the decision of the Court of Federal Claims. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends that he had a statutory and Fifth Amendment right to a hearing before a Physical Evaluation Board to determine his eligibility for disability retirement benefits. Petitioner was not entitled to a Physical Evaluation Board hearing, however, under either 10 U.S.C. 1214 or the Fifth Amendment. Moreover, the ABCMR review of his application satisfied any due process rights petitioner may have had. Thus, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioner argues that he is entitled to a hearing under 10 U.S.C. 1214, which provides "[n]o member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it." By its express terms, this provision applies only when a branch of the armed forces takes action to retire or separate a service member on the basis of a physical disability. See *Charles* v. *Rice*, 28 F.3d 1312, 1320-1321 (1st Cir. 1994) ("A 'physical disability' must be the reason for discharge before a board is convened. *See* 10 U.S.C. § 1214."); *Quailes* v. *United States*, 25 Cl. Ct. 659, 663 (1992) ("Plaintiff does not have a valid claim under 10 U.S.C. §§ 1214, 1218 because both statutes address situations, unlike plaintiff's, wherein the member is separated for physical disability. Plaintiff in this case was separated for misconduct, not disability."); *Brown* v. *United States*, 396 F.2d 989, 995 (Ct. Cl. 1968) ("While 10 U.S.C. § 1214 (1964) mandates a 'full and fair' hearing for a member of the armed

services before separation for physical disability, he may be (and often is) separated for reasons other than disability (e.g., longevity) without a hearing even though he believes he is entitled to disability-retirement pay."); *Powell* v. *Marsh*, 560 F. Supp. 636, 640 (D.D.C. 1983) ("It is clear from the terms of [10 U.S.C. 1214] that it was not intended to apply to the facts of this case. Here, plaintiff is not being *forced* to retire because of physical disability. Rather, he is *voluntarily* seeking the correction of his military records to indicate that he retired disabled.") (emphasis added).

The Army did not retire or separate petitioner on the basis of a physical disability. After petitioner recovered from the catheterization, angioplasty, and bypass surgery in 1989, he was deemed fit for duty, continued his service as a dentist in the Army Reserve, and was promoted in 1991. C.A. App. 160. The Army Reserve never attempted to separate or retire him for any physical disability after April 1989. Instead, petitioner was not selected for retention in 1997, and he was retired. *Id.* at 31. Nothing in petitioner's records indicates that he was forced to retire due to disability. Therefore, 10 U.S.C. 1214 does not apply.[4]

b. Petitioner also cites Army Regulations which he interprets to require that a Medical Evaluation Board

---

[4] The fact that a Medical Evaluation Board, during petitioner's April 1989 surgery, recommended the convening of a Physical Evaluation Board, did not give petitioner a statutory right to such a hearing. Pet. 4, 7-8, 13. The April 1989 recommendation was based upon the possibility, at the time of the surgery, that petitioner might not survive surgery. Pet. App. 17a. But petitioner did survive the surgery and resumed his Army Reserve service. *Id.* at 5a. As discussed above, he was not retired or separated based on physical disability and thus 10 U.S.C. 1214 (1994 & Supp. IV 1998) does not apply.

refer a case to a Physical Evaluation Board. Pet. 16-18. The Medical Evaluation Board convened during petitioner's surgery did just that. Pet. App. 15a. Nothing in these regulations, however, requires that a hearing be held before a Physical Evaluation Board. Because petitioner recovered from his surgery, continued his military service, and was not separated based on any medical disability, he had no right to a Physical Evaluation Board hearing.

Even if such a right existed, petitioner did not exercise it. There is no indication in the record that petitioner mentioned a Physical Evaluation Board until five years after his surgery when he filed his claim with the ABCMR. While petitioner noted in his ABCMR application that he had not received a Physical Evaluation Board hearing, he did not ask the ABCMR to convene such a hearing or make a determination that the Army erred in not conducting a hearing. Pet. App. 15a. Instead, petitioner asked the ABCMR to undertake the same inquiry that a Physical Evaluation Board would have made and find that he should be medically retired at a disability rate of 100%, effective as of April 1989. *Ibid.* In disability cases, both military boards of correction, such as the ABCMR, and review boards, such as a Physical Evaluation Board, are "competent to make a disability determination in the first instance." *Sawyer* v. *United States*, 930 F.2d 1577, 1581 (Fed. Cir. 1991).

2. a. Petitioner also errs in contending that the he is entitled to a Physical Evaluation Board hearing under the Due Process Clause of the Fifth Amendment. Petitioner had no property interest in disability retirement. Due process is a safeguard to protect interests "that a person has already acquired in specific benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972).

"The principle is well established that there is no vested right to Federal employment or to the privileges of retirement thereby." *Norman* v. *United States*, 392 F.2d 255, 259 (Ct. Cl. 1968), cert. denied, 393 U.S. 1018 (1969). A service member's entitlement to pay, including retirement pay, is dependent upon his ability to fulfill statutory prerequisites. *Wyatt* v. *United States*, 2 F.3d 398, 400 (Fed. Cir. 1993). Accordingly, this Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) (citing *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985)). Thus, petitioner, as a mere unsuccessful applicant, holds no property right to disability retirement.[5]

b. Even if petitioner could establish a property right to disability retirement, the ABCMR review process provided petitioner with due process. As the Federal Circuit stated in *Sawyer*, the ABCMR and Physical Evaluation Boards both "act on behalf of the Secretary, and we can see no reason why the secretarial responsibility over disability retirements cannot be exercised by either or both of them." *Sawyer*, 930 F.2d at 1582; see also *Ferrell* v. *United States*, 23 Cl. Ct. 562, 568 n.6 (1991) (a military records correction board "has the

---

[5] Contrary to petitioner's claim, this case is not akin to *United States* v. *Larianoff*, 431 U.S. 864 (1977), in which this Court held that under a re-enlistment bonus statute, bonus levels vested when a service member agreed to re-enlist, as opposed to when the re-enlistment actually occurred. *Id.* at 877. Under 10 U.S.C. 1204 (1994 & Supp. IV. 1998), a number of prerequisites must be met before a branch of the armed services has the authority to retire a member with disability retirement pay.

power to evaluate a service member's entitlement to disability benefits and act on behalf of the Secretary just as the PEB does").

The procedures and standard of review before the ABCMR satisfy due process requirements. The fact that the ABCMR denied petitioner's application without an oral hearing does not amount to a deprivation of procedural due process. *Burns* v. *United States*, 9 Cl. Ct. 273, 279 (1985)). In presenting a claim to the ABCMR, petitioner had many of the same procedural rights he would have had before a Physical Evaluation Board. Petitioner was entitled to representation by legal counsel, see AR 15-185, § III, ¶¶ 10e-10f (making reference to applicant's counsel); petitioner "had the right to, and did, supplement the record before the ABCMR," Pet. App. 9a n.1, 15a (noting that petitioner submitted 29 documents); the ABCMR must make available to the applicant and his counsel any advisory opinions it considered, AR 15-185, § VI, ¶ 21b; the ABCMR must provide a written denial of an application explaining its legal and factual rationale, *id.* § III, ¶¶ 10d-10f; and the applicant has a right to request reconsideration of the ABCMR's decision, *id.* § VI, ¶ 22.

Contrary to petitioner's contention, Pet. 19, both a Physical Evaluation Board and the ABCMR must apply the same presumption requirements of AR 635-40, ¶ 2-2. In fact, the ABCMR decision in this case makes clear that the ABCMR applied the same Army Regulations that a Physical Evaluation Board would apply. See, *e.g.*, Pet. App. 19a (applying AR 635-40, ¶ 2-3(a)-(c), which are used by a Physical Evaluation Board).[6] And

---

[6] The ABCMR decision cites a later version of the Army Regulations in which these provisions were moved to paragraph 3-3.

through its ability to obtain advisory opinions from those with specialized knowledge pursuant to AR 15-185, § VIII, ¶ 27b, the ABCMR, like a Physical Evaluation Board, has full access to medical advice. In petitioner's case, the ABCMR called upon the Army Surgeon General to provide a medical assessment of petitioner, and the U.S. Army Physical Disability Agency to provide an assessment of whether petitioner's medical problems were service-aggravated. Pet. App. 18a-19a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JOHN C. HOYLE
JAMES M. KINSELLA
KATHERINE M. KELLY
Attorneys

NOVEMBER 2000